



September 18, 2000

Ms. Mia Martin
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OR2000-3589

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139087.

The Richardson Independent School District (the "district"), which you represent, received a request for information which seeks in pertinent part "[c]opies of all notes, records, reports, and all other documents regarding and/or resulting from the investigation of irregularities in TAAS testing at the White Rock Elementary School."¹ You have submitted for our review a representative sample² of information that is responsive to the request, consisting of an eight page piece of correspondence from the district to the Texas Education Agency. You assert that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that, pursuant to Open Records Decision No. 634 (1995), you explain that the district has withheld some of the requested information as student records under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and that you do not seek our decision as to the student record information that has been withheld from the requestor. In Open Records Decision No. 634 (1995), this office concluded: (1) an

¹The request includes other categories of information. Except as otherwise noted herein, you indicate that the district has released to the requestor, an attorney, the other information that was requested. You also explain that the requestor has clarified the above request as not encompassing "copies of statements made by persons other than [the requestor's] client" and as specifically seeking "the district's summary of [the] investigation, the conclusions that were reached and the recommendations made as a result of [the] investigation."

²In reaching our conclusion here, we assume that the "representative sample" you have submitted to this office is truly representative of the requested records as a whole that the district seeks to withhold. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. We advise that Open Records Decision No. 634 applies only to "education records" under FERPA. "Education records" are records that (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 at 4 n.6, 8 (1995).

You also state that you have withheld from the requestor "[a]ny teacher or administrator evaluations, except [those of the requestor's client], that would otherwise be responsive to [the] request[.]" You claim that this information is excepted from required public disclosure by section 552.101 of the Government Code. You also state that the district does not seek our decision as to this information. We emphasize, however, that unlike the student record information we addressed in Open Records Decision No. 634, this office has not issued a previous determination that authorizes the district to withhold from the public "teacher or administrator evaluations" without seeking a decision from this office. We also emphasize that section 552.301 of the Government Code provides that, unless the district has received a previous determination from this office as to the precise information at issue, the district *must* seek a decision from this office as to whether the information at issue falls within one the Public Information Act's exceptions to required public disclosure. *See* Gov't Code § 552.301(a).

Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. With reference to the "teacher or administrator evaluations" that are responsive to the present request, you did not submit to this office a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has long held that information made confidential by another source of law constitutes a compelling reason to withhold the information sufficient to overcome the section 552.302 presumption of openness. *See, e.g.*, Open Records Decision Nos. 150 (1977), 26 (1974); *see also* Gov't Code § 552.352 (distribution of confidential information constitutes a criminal offense). However, in this instance, you have not submitted the "teacher or administrator evaluations" at issue, or representative samples of that information, so we have no basis for finding it confidential. Thus, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge this decision in court as outlined below.

As to the information you have submitted for our review, we begin with your section 552.111 assertion. From your comments on the submitted sample, you assert that the entire sample is excepted from required public disclosure by this provision. Section 552.111 of the Government Code excepts from required public disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception has two aspects, one of which incorporates the common law "deliberative process privilege." This aspect of section 552.111 excepts interagency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). Its purpose is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). You have not explained how the information you seek to withhold relates to any specific policy deliberation of the district. Our review of the submitted sample indicates that it consists entirely of factual recitations. We therefore conclude that you have not demonstrated the applicability of the "deliberative process privilege" aspect of section 552.111 to any of the information at issue. Thus, you may not withhold the information under section 552.111.

We next address your section 552.101 assertion, which we understand from your markings pertains to the social security numbers that you have highlighted in the submitted sample.³ Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the submitted sample are confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990. If the social security numbers are not excepted under section 552.101, this information may nevertheless be subject to withholding under section 552.117 of the Government Code, as discussed below.

You have also marked for redaction the home address and home telephone number of a public employee, for which you apparently assert section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Information must be withheld from the public under the doctrine of common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). We find no information in the submitted sample that is excepted from public disclosure on the basis of common law privacy. However, the public employee's home address and home telephone number may nevertheless be subject to withholding under section 552.117 of the Government Code, which we next address.

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

Section 552.117(1) of the Government Code excepts from required public disclosure information that relates to a public employee's home address, home telephone number, social security number, or that reveals whether the employee has family members. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see also* Gov't Code §§ 552.024, .117. This provision applies to the information of those public employees who elected non-disclosure in accordance with section 552.024 of the Government Code. You may not, however, withhold such information of a current or former employee who made the section 552.024 election *after* the present request for information was received by the district. Whether a particular piece of information is public must be determined at the time of the request for the information. Open Records Decision No. 530 at 5 (1989). Therefore, if the employee elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, and prior to when the present request for information was made, we believe that the district must withhold this information from required public disclosure pursuant to section 552.117(1).

Finally, we address your section 552.131 assertion. Section 552.131 provides in pertinent part:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
- (c) Subsection (b) does not apply:
 - (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
 - (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
 - (3) if the informer planned, initiated, or participated in the possible violation.

Because the Legislature limited the protection of section 552.131 to persons who report possible violations of “law,” we do not believe that the mere report of a violation of a school district policy or procedure is sufficient to invoke the protection of section 552.131. Thus, this exception does not apply to an individual who merely alleges the commission of behavior that does not constitute a violation of criminal, civil or regulatory law. *Cf.* Open Records Decision No. 515 (1988). Nor would this exception protect the identity of an individual who merely provides information to the school district during an investigation, but whose statement does not contain an allegation of a violation of law. Consequently, as part of its burden of demonstrating the applicability of section 552.131, a school district must clearly identify to this office the precise law or regulation alleged to have been violated in the individual’s statement. *See* Gov’t Code § 552.301(e)(1). In the instant case, your comments to this office indicate that an individual you have identified reported to the district alleged violations of the test security and confidentiality requirements found in section 101.4 of title 19 of the Texas Administrative Code. *See* 19 T.A.C. § 101.4. Based on this representation and our review of the information at issue, we believe you have demonstrated the applicability of section 552.131 to some of the information in the submitted sample.⁴ We accordingly find that the district may redact information from the sample, to the extent that the information, if released, would identify the individual as an informer. We have marked the specific information that the district may redact pursuant to section 552.131.

In summary, pursuant to section 552.302, the district must release to the requestor the responsive “teacher or administrator evaluation” information. As to the information for which the district has requested our decision herein, the social security numbers and employee information, discussed above, may be confidential and therefore subject to required redaction pursuant to section 552.101 or 552.117. The district may also redact the specific information we have marked pursuant to section 552.131, because its release would identify a named individual as an informer. The remaining information that is responsive to the request must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

⁴We assume the individual has not consented to the disclosure of the individual’s identity as an informer. *See* Gov’t Code § 552.131(c).

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

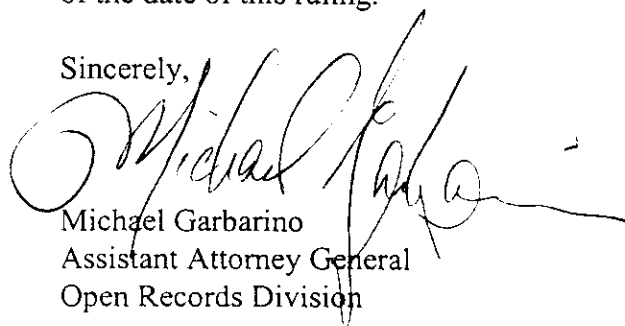
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 139087

Encl. Submitted documents

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